United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

74-1366

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- X

JOHN CHARLES FERRANTO,

Appellant,

- against -

UNITED STATES OF AMERICA,

Appellee.

- X

B

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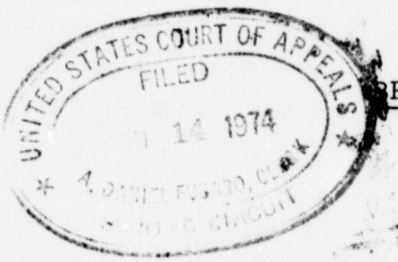

BRIEF FOR THE APPELLEE

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STEVEN KIMELMAN,
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Of Counsel

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PRELIMINARY STATEMENT

John Charles Ferranto appeals from an Order of the United States District Court for the Eastern District of New York (Mishler, Ch.J.), entered on January 28, 1974, denying without a hearing, his petition under Title 28, United States Code, Section 2255 to vacate a judgment of conviction for armed bank robbery. On December 27, 1971, appellant pled guilty to Count One of a two count Indictment charging armed bank robbery in violation of Title 18 United States Code, Section 2113(a) and (d).

On this appeal appellant contends that Chief Judge Mishler improperly considered erroneous information contained in appellant's pre-sentence report before imposing sentence. Appellant also complains that he was denied an evidentiary hearing to correct these alleged misstatements.

STATEMENT OF THE CASE

Appellant was indicted on November 9, 1971 with co-defendant, John S. Grillo. The indictment charged appellant and Grillo with two counts of armed bank robbery (Title 18 United States Code, Section 2113(a) and (d) and Section 2). On December 27, 1971, appellant entered a guilty plea to Count One of the indictment before Chief Judge Mishler. On March 3, 1972, appellant was sentenced to fifteen years imprisonment.

On January 21, 1974, appellant filed a petition pursuant to Title 28 United States Code, Section 2255 to vacate his sentence. Chief Judge Mishler denied the petition without hearing by a memorandum decision and order filed January 28, 1974.

Appellant had filed an earlier petition on July 26, 1973 pursuant to Title 28 United States Code, Section 2255 which alleged almost identical grounds (Ferranto's motion of July 26, 1973, Appellee's Appendix "A"). This earlier petition was also denied by Chief Judge Mishler, without a hearing; by a memorandum decision and order dated August 9, 1973 (Memorandum and Order of August 9, 1973 Appellee's Appendix "B"). No appeal was taken from this decision and Appellant presents no new argument in this appeal.

ARGUMENT

APPELLANT'S SENTENCE WAS LAWFULLY IMPOSED

Appellant specifically contends that the District Court in sentencing him relied on errors and misstatements found in the pre-sentence report as to appellant's prior criminal record. Appellant also maintains that the District Court erred in not granting him a hearing on these allegations. In his papers filed in support of his petition below, appellant desperately attempts to explain away each of his many prior arrests and convictions. Appellant alleges, without offering any supporting evidence, in essence that (i) there are misstatements in his juvenile record; and (ii) incorrect dispositions as to certain other arrests and convictions.

Despite appellant's careful point-by-point refutation of his "prior record" as stated in the pre-sentence report, several major items set forth in that section of the pre-sentence report remain substantially unchallenged by appellant. These include appellant's (1) 1957 conviction (after a guilty plea) for armed robbery; (2) escape from a Virginia jail while waiting sentencing on the aforementioned conviction; and (3) 1970 arrest and indictment by Nassau County, New York authorities on charges of attempted murder, robbery I,

kidnaping, grand larceny, and possession of a weapon.*

In the District Court Memorandum and Decisions of January 28, 1974 and August 9, 1973, Chief Judge Mishler expressly relies on the aforementioned unchallenged convictions of appellant in determining the sentence to be imposed. Chief Judge Mishler completely refuted appellant's claim that his sentence was based on incorrect information as to his "prior record" in stating the following:

> Assuming the petitioner's version of the portion of the prior record to be true, the petition [Ferranto Petition of July 26, 1973] is insufficient as a matter of law. The court did not rely to slightest degree on the charges referred to in the petition. . . . . Petitioner's co-defendant (Grillo) used a sawed off shotgun in the armed bank robbery, the offense made the subject of this petition. The court is convinced that petitioner is a man of violence, inclined to use and/or tolerate the use of deadly weapons in the commission of crimes. The plea of guilty to the Nassau County charges lends further support to this finding.** (Memorandum and Order of August 9, 1973, Appellee's Appendix "B").

*In addition, on August 14, 1972, appellant pled guilty to robbery I and was sentenced to a term of 15 years (Memorandum and Order of August 9, 1973, Appellee's Appendix "B"). Appellant also has never challenged other allegations set forth in the pre-sentence report to the effect that appellant participated with co-defendant Grillo in two other armed bank robberies in 1971. (Pre-sentence Report, Appellee's Appendix "C"). In fact appellant was charged in two separate indictments for participating in these robberies. The indictments were dismissed at his sentencing on March 3, 1972, after his guilty plea to the bank robbery which is the subject of this appeal.

**Although Appellant's Petition of January 21, 1974 contains a somewhat more extensive refutation of alleged errors in his pre-sentence report, no new substantive grounds for vacation under Section 2255 are presented. Judge Mishler therefore incorporated by reference his decision of August 9, 1973 into January 25, 1974 memorandum decision on appeal here.

Appellant's reliance on United States v. Tucker, 404 U.S. 443 (1972) is misplaced. In Tucker, the sentencing court specifically relied on two prior state felony convictions which were later declared unconstitutional by the state courts. Appellant makes no argument in either his petition below, or an appeal that any of his prior convictions were constitutionally defective. On the contrary, Appellant is limited to a claim of several alleged misstatements in the pre-sentence report as to his juvenile record and as to the disposition of certain other relatively minor charges. Moreover the District Court specifically found that it did not rely on any of the alleged misstatements in determining appellant's sentence. It is difficult to believe that the Supreme Court intended to extend the Tucker rationale to the situation posed on this appeal.

Finally, appellant and his attorney Ira London, Esq., were given a copy of the pre-sentence (Probation) report shortly before sentence was imposed. The following dialogue occurred at appellant's sentencing on March 3, 1972:

> THE COURT: All right. Having read the Probation Report, Mr. John Charles Ferranto, do you have anything to say before sentence is imposed upon you?
>
> MR. LONDON: There is really not much in the Probation Report I would want to emphasize. Most of it is negative. The defendant has very few things to commend him to this Court.
>
> THE COURT: I give this to you to make certain that what is in the report reported accurately. (Transcript

of Sentencing; Appellee's Appendix "D".)

Neither appellant nor his attorney seized this opportunity to state any alleged misstatements as to appellant's prior criminal record.

Appellant's other claim on this appeal is that the District Court erred in not granting him a evidentiary hearing on his allegations. It is well established in this Circuit, however, that an evidentiary hearing is not required every time a defendant alleges the falsity of statements contained in his pre-sentence report. United States v. Needles, 472 F.2d 652, (2d Cir. 1973); Schwartzberg v. United States, 382 F.2d 1013 (2d Cir. 1967). Appellant has had ample opportunity in both of his Section 2255 motions to present the sentencing court with written refutation of the alleged misstatements in his pre-sentence report. It is quite obvious that in view of (1) appellant's complete failure to provide any supporting evidence for his bare allegations, and (2) the District Court's specific denial of reliance on these alleged misstatements, no useful purpose would be served by appellant's repeating these allegations in open court.

CONCLUSION

The order appealed from should be affirmed.

Raymond J. Dearie
Assistant U.S. Attorney

Steven Kimelman
Assistant U.S. Attorney
(Of Counsel)

Form No. USA-52a-6a
(Rev. 1-29-71)

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

DEBORAH J. AMUNDSEN, being duly sworn, says that on the 11th day of June 1974, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a two copies of the brief for the appellee & appendix (by certified mail return receipt requested) of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

John C. Ferranto
U.S. Penitentiary
P.M.B. 74054-158
Atlanta, Georgia 30315

Sworn to before me this
11th day of June 1974

Sylvia E. Morris

SYLVIA E. MORRIS
Notary Public, State of New York
No. 24-4503861
Qualified in Kings County
Commission Expires March 30, 19.75

Deborah J. Amundsen

DEBORAH J. AMUNDSEN

SIR:

PLEASE TAKE NOTICE that the within will be presented for settlement and signature to the Clerk of the United States District Court in his office at the U. S. Courthouse, 225 Cadman Plaza East, Brooklyn, New York, on the ____ day of _____, 19____, at 10:30 o'clock in the forenoon.

Dated: Brooklyn, New York,
_____, 19____

_____
United States Attorney,
Attorney for _____

To:
_____
_____
_____
Attorney for _____

SIR:

PLEASE TAKE NOTICE that the within is a true copy of _____duly entered herein on the ____ day of _____
_____, in the office of the Clerk of the U. S. District Court for the Eastern District of New York,
Dated: Brooklyn, New York,
_____, 19____
_____
United States Attorney,
Attorney for _____

To:
_____
_____
_____
Attorney for _____

_____ Action No._____

UNITED STATES DISTRICT COURT
Eastern District of New York

—Against—

_____
United States Attorney,
Attorney for _____
Office and P. O. Address,
U. S. Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

Due service of a copy of the within _____
_____is hereby admitted.
Dated: _____, 19____

_____
Attorney for _____

FPI-LC-5M-8-73-7355